

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MARY ROE, as Guardian for JANE  
DOE,

Plaintiffs,

v.

CITY OF SPOKANE, WASHINGTON, a  
municipal corporation, including  
its Fire Department and its  
Police Department; DANIEL ROSS  
and JANE DOE ROSS, husband and  
wife; DETECTIVE NEIL GALLION,  
SGT. JOE PETERSON; and JOHN AND  
JANE DOES 1-10, husbands and  
wives,

Defendants.

No. CV-06-0357-FVS

ORDER DENYING PLAINTIFFS'  
MOTIONS FOR RECONSIDERATION

**THIS MATTER** comes before the Court on Plaintiffs' September 19, 2008 motion for reconsideration of the Court's entry of summary judgment dismissing Plaintiffs' causes of action against the City Defendants as well as the state law claim of sexual exploitation of a minor against Defendant Ross. (Ct. Rec. 425). In the alternative, Plaintiffs request that the Court certify the matter for interlocutory review pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292. Also before the Court is Plaintiffs' second motion for reconsideration filed on October 10, 2008. (Ct. Rec. 435). Plaintiffs request relief, pursuant to Fed. R. Civ. P. 60(b)(2) & 60(b)(3), based upon newly discovered evidence. *Id.* Plaintiffs are represented by Greg M.

1 Devlin, J. Scott Miller, and Ernst D. Greco. Defendants, Daniel and  
2 Jane Doe Ross, are represented by Christian J. Phelps. The City of  
3 Spokane and the remaining Defendants are represented by Rocco N.  
4 Treppiedi.

5 **BACKGROUND**

6 Following this Court's July 9, 2008 ruling on Defendants' motions  
7 to dismiss (Ct. Rec. 262), Plaintiffs remaining 42 U.S.C. § 1983  
8 claims alleged that Defendant Daniel Ross, under color of law,  
9 infringed upon their constitutional rights by sexually assaulting Jane  
10 Doe, and that the City Defendants' failure to supervise Mr. Ross  
11 resulted in the sexual assault. They further alleged that Detective  
12 Gallion and Sergeant Peterson ("the officers") deprived Plaintiffs of  
13 their right to equal protection under the law by deleting digital  
14 photographs of the alleged sexual assault. Plaintiffs also continued  
15 to seek recovery under state law theories of assault and battery,  
16 sexual exploitation of a minor, negligent infliction of emotional  
17 distress and outrage with respect to Mr. Ross, negligent supervision  
18 of Mr. Ross with respect to the City of Spokane ("the City"), and  
19 outrage with respect to the conduct of the officers.

20 The City Defendants moved for summary judgment on all of  
21 Plaintiffs' remaining claims. (Ct. Rec. 278, 279). Mr. Ross joined  
22 in the City Defendants' motions for summary judgment and filed  
23 separate motions for summary judgment on all of Plaintiffs' remaining  
24 claims against him. (Ct. Rec. 285, 293, 295). Plaintiffs moved for  
25 partial summary judgment on their remaining Section 1983 claims. (Ct.  
26 Rec. 299).

1 On September 5, 2008, the Court issued its order on the summary  
2 judgment motions. (Ct. Rec. 412). The Court determined that the City  
3 Defendants were entitled to summary judgment on Plaintiffs' remaining  
4 federal and state causes of action. The Court found that the facts do  
5 not show, under federal law, that a City policy or custom or the  
6 City's hiring, training or supervision program caused Ms. Doe to be  
7 subjected to an alleged sexual assault. In addition, the Court  
8 concluded that the officers did not single out Ms. Doe or treat her  
9 differently from others similarly situated.

10 Under Washington State law, the Court found that the City was  
11 entitled to summary judgment on Plaintiffs' claim of negligent  
12 supervision, and summary judgment was proper on Plaintiffs' outrage  
13 claim against the officers. The Court thus dismissed all federal and  
14 state claims remaining against the City of Spokane, Detective Neil  
15 Gallion, Sergeant Joe Peterson and John and Jane Does, 1-10, husbands  
16 and wives.

17 With respect to Mr. Ross, the Court dismissed Plaintiffs' sexual  
18 exploitation of a minor claim. However, the Court found that  
19 Plaintiffs' federal claim with respect to the conduct of Mr. Ross as  
20 well as the state law claims against Mr. Ross for assault and battery,  
21 negligent infliction of emotional distress and outrage remained  
22 viable.

23 Plaintiffs filed a motion for reconsideration of the Court's  
24 order on September 19, 2008. (Ct. Rec. 425). The City Defendants  
25 filed a reply in opposition on October 8, 2008. (Ct. Rec. 433).  
26 Plaintiffs filed a reply on October 10, 2008. (Ct. Rec. 434). Also

1 on October 10, 2008, Plaintiffs filed a motion for reconsideration  
2 pursuant to Fed. R. Civ. P. 60(b)(2) & 60(b)(3), based upon newly  
3 discovered evidence. (Ct. Rec. 435).

#### 4 DISCUSSION

##### 5 I. Standard of Review

6 The Federal Rules of Civil Procedure do not mention a "motion for  
7 reconsideration." Even so, a motion for reconsideration is treated as  
8 a motion to alter or amend judgment under Rule 59(e) if it is filed  
9 within ten days of entry of judgment. *United States v. Nutri-Cology,*  
10 *Inc.*, 982 F.2d 394, 397 (9th Cir. 1992). Otherwise, it is treated as  
11 a Rule 60(b) motion. *See, United States v. Clark*, 984 F.2d 31, 34  
12 (2nd Cir. 1993).

13 Under Rule 59(e), reconsideration is appropriate if the district  
14 court "(1) is presented with newly discovered evidence, (2) committed  
15 clear error or the initial decision was manifestly unjust, or (3) if  
16 there is an intervening change in controlling law." *School Dist. No.*  
17 *1J, Multnomah County, OR v. A C and S, Inc.*, 5 F.3d 1255, 1263 (9th  
18 Cir. 1993). It is within the Court's discretion to reconsider its  
19 order. *Id.* Reconsideration is available under Rule 60(b) upon a  
20 showing of (1) mistake, inadvertence, surprise, or excusable neglect;  
21 (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a  
22 satisfied or discharged judgment; or (6) any other reason justifying  
23 relief. Fed. R. Civ. P. 60(b).

24 Here, Plaintiffs moved for reconsideration, pursuant to Fed. R.  
25 Civ. P. 59(e) and 60(b) within ten days of the Court's challenged  
26 order (Ct. Rec. 425) and later moved for reconsideration pursuant to

1 Fed. R. Civ. P. 60(b)(2) and (3) (Ct. Rec. 435). The Court will  
2 exercise it discretion and reconsider its order on the parties'  
3 motions for summary judgment (Ct. Rec. 412) under both Fed. R. Civ. P.  
4 59(e) and 60(b).

5 **II. Plaintiffs' First Motion for Reconsideration**

6 Defendants seek reconsideration of the Court's Order on the  
7 following grounds: (1) errors of fact with respect to Plaintiffs'  
8 equal protection claim, (2) error of law as to Plaintiffs' Section  
9 1983 claim against the City Defendants, (3) error of law regarding the  
10 Court's interpretation of Plaintiffs' right to recovery for sexual  
11 exploitation of a minor, and (4) error by dismissing Plaintiffs'  
12 outrage claim against the officers. (Ct. Rec. 426). Plaintiffs have  
13 failed to present newly-discovered evidence to warrant  
14 reconsideration, and are not contending that there has been an  
15 intervening change in controlling law. Plaintiffs essentially argue  
16 that there are clear errors of fact and law and that the judgment  
17 should be corrected to prevent manifest injustice.

18 **A. Errors of Fact**

19 Plaintiffs assert that the dismissal of the City Defendants  
20 resulted in manifest injustice as a result of errors of fact by the  
21 Court. (Ct. Rec. 426 at 2). Specifically, Plaintiffs argue that  
22 there was evidence Ms. Doe was treated differently than other  
23 similarly situated victims, and the Court incorrectly gave weight to  
24 the testimony of the officers as to their motive for destroying the  
25 digital photographs. (*Id.* at 2-6).

26 ///

1 In order to succeed upon an equal protection claim, a plaintiff  
2 must prove that he or she has been "intentionally treated differently  
3 from others similarly situated and that there is no rational basis for  
4 the difference in treatment." *The Fishing Co. of Ala. v. United*  
5 *States*, 195 F. Supp. 2d 1239, 1254 (W.D. Wash. 2002) (internal  
6 citation and quotation marks omitted).

7 As determined by the Court, not only does it appear the officers  
8 had a rational basis for directing that the digital pictures be  
9 deleted in this case, the facts and evidence demonstrate that  
10 Plaintiffs were not intentionally treated differently from others  
11 similarly situated. (Ct. Rec. 412).

12 The facts demonstrate the officers were not aware that the  
13 digital photographs were evidence of a crime and subject to seizure.  
14 The deletion of the digital pictures was based on a mistaken belief of  
15 the law at the time, and negligent destruction of the evidence is not  
16 enough to support a claim under § 1983. Plaintiffs, in fact, conceded  
17 that the officers had "an inaccurate and incomplete understanding of  
18 Washington statutes regarding sexual exploitation of a minor . . . ."  
19 (Ct. Rec. 325 at 16). Directing that the digital photographs be  
20 deleted was consistent with Det. Gallion's understanding of the law at  
21 that time, not based on the identity of the alleged victim. Det.  
22 Gallion did not single out Ms. Doe. Accordingly, it was proper for  
23 the Court to conclude that, regardless of whom the alleged victim was  
24 at the time, Det. Gallion's actions would have been the same.

25 The undisputed facts demonstrate that the actions of the officers  
26 were not in violation of Ms. Doe's right to equal protection.

1 Contrary to Plaintiffs' assertions, the Court did not commit errors of  
2 fact. Plaintiffs' motion for reconsideration with respect to this  
3 claim is denied.

4 **B. Errors of Law**

5 **1. Section 1983 - - The City**

6 Plaintiffs assert that the Court erroneously concluded that the  
7 City did not deprive Plaintiffs of constitutional rights. (Ct. Rec.  
8 426 at 9). Plaintiffs argue that, contrary to the Court's findings,  
9 the City had policies, practices and customs in place both with  
10 respect to Defendant Ross and the City police department that were the  
11 moving force that deprived Plaintiffs of their rights. (*Id.* at 9-11).

12 To establish liability against the City, Plaintiffs had to show  
13 that (1) an employee of the City violated Plaintiffs' rights; (2) the  
14 City had customs or policies that amounted to deliberate indifference;  
15 and (3) these policies were the moving force behind the employee's  
16 violation of Plaintiffs' constitutional rights, in the sense that the  
17 City could have prevented the violation with an appropriate policy.  
18 *Gibson v. County of Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002). A  
19 municipality's failure to properly hire, train or supervise an  
20 employee who has caused a constitutional violation can be the basis  
21 for § 1983 liability where the inaction amounts to the deliberate  
22 indifference to the rights of persons with whom the employee comes  
23 into contact. *Canton v. Harris*, 489 U.S. 378, 388 (1989).

24 Here, the Court correctly determined that Mr. Ross' alleged  
25 actions were entirely inconsistent with his training as a fire fighter  
26 for the City. It was against City policy for Mr. Ross to view a

1 pornographic website, have sex in the fire station or commit an  
2 assault. Mr. Ross' alleged conduct was contrary to City policy and  
3 procedure.

4 There was additionally no showing of deficiencies with the  
5 hiring, training or supervision of Mr. Ross. Mr. Ross' history did  
6 not suggest he had a propensity to commit a sexual assault. Mr. Ross  
7 had been a satisfactory employee for approximately 15 years. He did  
8 not have a disciplinary or behavioral record which would indicate a  
9 concern that his behavior would be violative of City policy and  
10 procedure.

11 There was also no way for the City to know about Mr. Ross'  
12 relationship with Ms. Doe or to foresee that Mr. Ross would violate  
13 City policy by having a sexual encounter at a fire station. All of  
14 Mr. Ross' communications with Ms. Doe were made on his personal  
15 equipment. Mr. Ross never contacted Ms. Doe through any City computer  
16 or internet connection, nor did Ms. Doe contact Mr. Ross in that  
17 manner. It is undisputed that Mr. Ross inappropriately viewed a  
18 pornographic website a number of times while on duty at the fire  
19 station. However, even if the City had prior knowledge that Mr. Ross  
20 was viewing the adult website while on duty, there was no showing of a  
21 nexus between the viewing of this website and an inclination to commit  
22 a sexual assault.

23 The undisputed facts demonstrate that neither a City policy or  
24 custom, nor the City's hiring, training or supervision program caused  
25 Ms. Doe to be subjected to the alleged sexual assault. No error of  
26 law was committed by the Court with respect to this claim.

1 Plaintiffs' motion for reconsideration as to their Section 1983 claim  
2 against the City is denied.

3 **2. Sexual Exploitation of a Minor Claim**

4 Plaintiffs contend the Court erred by finding the Washington  
5 State criminal statute for Sexual Exploitation of a Minor inapplicable  
6 in this case. (Ct. Rec. 426 at 12-14). Plaintiffs argue that the  
7 Court's interpretation of the statute inappropriately "forces a  
8 reading that adds the language 'prosecution' or 'charge' or  
9 'conviction' in place of violation." (*Id.* at 13). Plaintiffs allege  
10 that a conviction is not necessary to satisfy the condition that a  
11 "violation" occurred. (*Id.* at 14).

12 The crime of sexual exploitation of a minor is established by  
13 showing that a person (1) compels a minor by threat or force to engage  
14 in sexually explicit conduct, knowing that such conduct will be  
15 photographed or part of a live performance, (2) aids, invites,  
16 employs, authorizes, or causes a minor to engage in sexually explicit  
17 conduct, knowing that such conduct will be photographed or part of a  
18 live performance, or (3) being a parent, legal guardian, or person  
19 having custody or control of a minor, permits the minor to engage in  
20 sexually explicit conduct, knowing that such conduct will be  
21 photographed or part of a live performance. RCW 9.68A.040.

22 There is no case law establishing a right to recovery in a civil  
23 lawsuit under the criminal statute RCW 9.68A where no criminal  
24 violations have been pursued. Plaintiffs cite in their motion for  
25 reconsideration a Western District of Washington case, *J.C. v. Society*  
26 *of Jesus*, 457 F. Supp. 2d 1201 (W.D. Wash. 2006), as support for their

1 claim that the criminal statute may be applied in this matter.  
2 However, in *J.C.*, the Western District specifically declined to decide  
3 whether the statute applied in that action. *Id.* at 1205. The Court  
4 merely reserved ruling on the applicability of RCW § 9.68A.130 to the  
5 case. *Id.*

6 Here, the Court did not determine that the crime of sexual  
7 exploitation of a minor could never be applied in a civil matter. To  
8 the contrary, the Court explicitly found that "it appears that the  
9 statute contemplates a right to recovery in a civil action for a  
10 violation of the criminal statute . . . ." (Ct. Rec. 412 at 25).  
11 This Court, however, properly concluded that although it appears that  
12 the statute contemplates a right to recovery in a civil action for a  
13 violation of the criminal statute, Plaintiffs failed to show a right  
14 to recovery on a claim of sexual exploitation of a minor "based on the  
15 facts of this case." Plaintiffs allegation of an error of law with  
16 respect to this claim is without merit. Plaintiffs' motion for  
17 reconsideration as to their claim against Defendant Ross for sexual  
18 exploitation of a minor is denied.

### 19 3. Outrage Claim

20 Plaintiffs contend that reasonable inferences drawn from the  
21 evidence "show that, at a minimum, the officers recklessly and  
22 intentionally disregarded the high probability that their actions in  
23 deleting the photos, threatening Jane Doe for filing a false police  
24 report, and bullying a sexual assault victim to the point of tears"  
25 caused severe distress. (Ct. Rec. 426 at 15).

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1 The tort of outrage has three elements in the state of  
2 Washington. *Orin v. Barclay*, 272 F.3d 1207, 1219 (9th Cir. 2001).  
3 First, the plaintiff must demonstrate that the defendant engaged in  
4 "extreme and outrageous" conduct. Second, the plaintiff must prove  
5 that the defendant intentionally or recklessly inflicted emotional  
6 distress on the plaintiff. Third, the plaintiff must prove that the  
7 defendant's actions actually resulted in "severe emotional distress."  
8 *Id.* Conduct is outrageous when it is "so extreme in degree, as to go  
9 beyond all possible bounds of decency, and to be regarded as  
10 atrocious, and utterly intolerable in a civilized community." *Grimsby*  
11 *v. Samson*, 85 Wash. 2d 52, 59, 530 P.2d 291, 295 (Wash. 1975).

12 Here, the facts demonstrate that the officers' direction to Mr.  
13 Ross to delete the digital pictures was based on a mistaken belief of  
14 the law at the time. Plaintiffs do not dispute that the officers had  
15 "an inaccurate and incomplete understanding of Washington statutes  
16 regarding sexual exploitation of a minor . . . ." (Ct. Rec. 325 at  
17 16). It is undisputed that the officers were not aware that the  
18 digital pictures were evidence of a crime and thus subject to seizure.  
19 Accordingly, Plaintiffs are not able to show more than negligence on  
20 behalf of the officers, and mere negligence is not enough to establish  
21 outrage. *Fisher v. State ex rel. Dept. of Health*, 125 Wn.App. 869,  
22 881, 106 P.3d 836, 841 (2005) (trial court properly dismissed  
23 plaintiff's claim for outrage where evidence revealed, at worst,  
24 negligence on the part of government agents). Therefore, even without  
25 considering the dearth of sufficient evidence regarding Ms. Doe's  
26 subsequent emotional distress and its connection to the acts of the

1 officers, the undisputed facts demonstrate that the conduct of  
2 Detective Gallion and Sergeant Peterson was not outrageous.  
3 Plaintiffs allegation of an error of law with respect to this claim is  
4 without merit. Plaintiffs' motion for reconsideration on their  
5 outrage claim against the officers is denied.

6 **C. Certification for Interlocutory Review**

7 Plaintiffs request, in the alternative, that the Court certify  
8 this matter for interlocutory review pursuant to Fed. R. Civ. P.  
9 54(b). (Ct. Rec. 426 at 18). The City Defendants do not object to  
10 the certification for interlocutory review pursuant to Rule 54(b).  
11 (Ct. Rec. 433 at 5).

12 Rule 54(b) authorizes courts to "direct the entry of a final  
13 judgment as to one or more but fewer than all of the claims or  
14 parties" if there is "no just reason for delay" in entering judgment.  
15 Fed. R. Civ. P. 54(b). "Rule 54(b) certification is proper if it will  
16 aid expeditious decision of the case . . . ." *Texaco, Inc. v.*  
17 *Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir. 1991). "The Rule 54(b)  
18 claims do not have to be separate from and independent of the  
19 remaining claims." *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465,  
20 468 (9th Cir. 1987). "However, Rule 54(b) certification is  
21 scrutinized to prevent piecemeal appeals in cases which should be  
22 reviewed only as single units." *Ponsoldt*, 939 F.2d at 798 (quoting  
23 *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10, 100 S.Ct.  
24 1460, 1466 (1980)) (internal punctuation omitted). The Court must  
25 focus on legal and factual "severability and efficient judicial  
26 administration." *Continental Airlines, Inc. v. Goodyear Tire & Rubber*

1 Co., 819 F.2d 1519, 1525 (9th Cir. 1987).

2 Here, the possibility of two trials, one against Defendant Ross  
3 and possibly one against the City Defendants should Plaintiffs prevail  
4 on appeal, would waste judicial resources as well as the resources of  
5 the parties and their counsel. *Matek v. Murat*, 638 F. Supp. 775, 784  
6 (C.D. Cal. 1986) (stay of proceedings pending Rule 54(b) appeal  
7 appropriate if efficiency and fairness are served). Accordingly, the  
8 Court grants Plaintiffs' motion, under Rule 54(b), for the  
9 interlocutory appeal of this Court's order (Ct. Rec. 412).

#### 10 **D. Certify for Immediate Appeal**

11 Plaintiffs also request that the Court certify the matter for  
12 immediate appeal pursuant to 28 U.S.C. § 1292(b). (Ct. Rec. 426 at  
13 19). Section 1292(b) of Title 28 of the United State Code provides,  
14 in pertinent part:

15 "When a district judge, in making in a civil action an order not  
16 otherwise appealable under this section, shall be of the opinion  
17 that such order involves a controlling question of law as to  
18 which there is substantial ground for difference of opinion and  
19 that an immediate appeal from the order may materially advance  
the ultimate termination of the litigation, he shall so state in  
writing in such order. The Court of Appeals . . . may thereupon,  
in its discretion, permit an appeal to be taken from such order .  
. . ."

20 "[Section] 1292(b) acts as a safety valve for serious legal questions  
21 taking the case out of the ordinary run." *Kennedy v. Bell Helicopter*  
22 *Textron, Inc.*, 283 F.3d 1107, 1116 (9th Cir. 2002). Certification for  
23 appeal under § 1292(b) is appropriate on an issue "raising an  
24 important and unsettled question of law whose disposition will advance  
25 the ongoing proceedings." *James v. Price Stern Sloan, Inc.*, 283 F.3d  
26 1064, 1067 (9th Cir. 2002).

1 Plaintiffs must meet three requirements in order to prosecute an  
2 interlocutory appeal. First, the decision they seek to appeal must  
3 involve a "controlling question of law." 28 U.S.C. § 1292(b).  
4 Second, there must be "substantial ground for difference of opinion"  
5 concerning the question. Third, an immediate appeal must "materially  
6 advance the ultimate termination of the litigation."

7 Here, it is appropriate to address only the second requirement,  
8 namely, whether there is "substantial ground for difference of  
9 opinion." Plaintiff indicates that the difference of opinion between  
10 this Court and that of the Western District of Washington with respect  
11 to a civil claim under title 9.68A RCW provides a basis for an  
12 immediate appeal under 28 U.S.C. § 1292(b). However, as noted above,  
13 in *J.C.*, the Western District specifically declined to decide and,  
14 instead, reserved ruling on, the applicability of RCW § 9.68A.130 to  
15 the action. 457 F. Supp. 2d at 1205. Moreover, this Court's ruling  
16 reflects that Plaintiffs failed to demonstrate a right to recovery on  
17 a claim of sexual exploitation of a minor "based on the facts of this  
18 case." The Court did not conclude that the crime of sexual  
19 exploitation of a minor could never be applied in civil matters. To  
20 the contrary, the Court explicitly found that "it appears that the  
21 statute contemplates a right to recovery in a civil action for a  
22 violation of the criminal statute . . . ." (Ct. Rec. 412 at 25).  
23 Consequently, Plaintiffs have failed to demonstrate a "substantial  
24 ground for difference of opinion" with respect to this issue. The  
25 Court thus denies Plaintiff's motion for the certification of an  
26 interlocutory appeal pursuant to 28 U.S.C. § 1292.

**III. Plaintiffs' Second Motion for Reconsideration**

On October 10, 2008, Plaintiffs filed an additional motion for reconsideration. (Ct. Rec. 435). Plaintiffs requested relief, pursuant to Fed. R. Civ. P. 60(b)(2) & 60(b)(3), based upon newly discovered evidence. *Id.* The newly discovered evidence Plaintiffs cite is allegations that Daniel Ross committed an assault on a teenage girl in the fall of 2007. (Ct. Rec. 435 at 6). Plaintiffs also contend that the City Defendants' fraud, misrepresentation or misconduct justifies vacating the Court's summary judgment order. (Ct. Rec. 435 at 6).

The events that gave rise to the present action occurred on February 10, 2006, and Mr. Ross has not been a City employee since March of 2006. The events giving rise to the Plaintiffs' second motion for reconsideration allegedly happened in the fall of 2007.

Even if the allegations asserted in this motion were before the Court for consideration at the time of the summary judgment hearing, it would not have resulted in a different outcome. Allegations of a fall 2007 assault on a teenage girl by Mr. Ross would have had no effect on this Court's conclusions that a City policy or custom or the City's hiring, training or supervision program did not cause Ms. Doe to be subjected to an alleged sexual assault on February 10, 2006, the actions of the officers did not violate Plaintiffs' right to the equal protection under the law, the City did not know, nor should have known, that Defendant Ross would engage in sexual activity at the fire station on February 10, 2006, and the actions of the officers were not outrageous. Accordingly, this later in time incident, even if

1 determined to be true, is not relevant to the facts of the present  
2 lawsuit.

3 Plaintiffs further argue that the City concealed the allegations  
4 of the fall 2007 assault on a teenage girl by Mr. Ross. (Ct. Rec. 435  
5 at 6). However, the City does not represent Mr. Ross in this lawsuit.  
6 Nonetheless, based upon the information disclosed by Plaintiffs (Ct.  
7 Rec. 438), there has been no demonstrated fraud perpetrated by the  
8 City Defendants with respect to the allegations presented in this  
9 motion. Plaintiffs have not provided a valid basis for the Court to  
10 vacate its summary judgment order.

#### 11 **CONCLUSION**

12 Upon reconsideration of its order, the Court determines that the  
13 undisputed facts demonstrate the actions of the officers were not in  
14 violation of Ms. Doe's right to equal protection and neither a City  
15 policy or custom, nor the City's hiring, training or supervision  
16 program caused Ms. Doe to be subjected to the alleged sexual assault,  
17 there has been no showing of a right to recovery on a claim of sexual  
18 exploitation of a minor based on the facts of this case, and  
19 Plaintiffs are not able to show more than negligence as a result of  
20 the officers' deletion of the digital photographs and mere negligence  
21 is not enough to establish outrage. Plaintiffs claim of a manifest  
22 injustice as a result of the aforementioned alleged errors is  
23 therefore without merit. Plaintiffs' second motion for  
24 reconsideration is equally unconvincing.

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1 The Court being fully advised, **IT IS HEREBY ORDERED:**

2 1. Plaintiffs' First Motion for Reconsideration (**Ct. Rec. 425**)  
3 is **DENIED**.

4 2. Plaintiffs' Second Motion for Reconsideration (**Ct. Rec. 435**)  
5 is **DENIED**.

6 3. Plaintiffs' motion, under Rule 54(b), for the interlocutory  
7 appeal of this Court's order (Ct. Rec. 412) is **GRANTED**, but  
8 Plaintiff's motion for certification of an interlocutory appeal  
9 pursuant to 28 U.S.C. § 1292 is **DENIED**.

10 4. All pending motions in this matter, including the City  
11 Defendants' June 4, 2008 motion to Compel (**Ct. Rec. 195**), Plaintiffs'  
12 June 13, 2008 motion for a protective order (**Ct. Rec. 207**) and  
13 Plaintiffs' September 17, 2008 motion in limine (**Ct. Rec. 424**) are  
14 **DENIED WITHOUT PREJUDICE TO THEIR RENOTICE**. Following a determination  
15 on the interlocutory appeal, counsel may renote the motions for  
16 hearing if they determine that the resolution of the motion is  
17 necessary.

18 **IT IS SO ORDERED.** The District Court Executive is hereby  
19 directed to enter this order and furnish copies to counsel.

20 **DATED** this 16th day of October, 2008.

21 S/Fred Van Sickle

22 Fred Van Sickle  
23 Senior United States District Judge  
24  
25  
26